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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994

SARAH ASHBY SAWTELL,

Petitioner,

vs.

E.I. DU PONT DE NEMOURS AND COMPANY, INC., a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a person who was a member of a putative class as described in a class action complaint should be retroactively denied all class action tolling because class counsel, subsequent to the filing of the complaint, moved to certify a class narrower than that alleged in the complaint and which did not include the plaintiff?

Whether an individual plaintiff who claims the protection of the class action tolling doctrine may rely on the class complaint's description of the class, or must the injured plaintiff in addition "prove" that the representative of the putative class intended persons such as this individual to be members of the class?

TABLE OF CONTENTS

Page

Questions Presented . . . . . *i*

Table of Authorities . . . . . *v*

Opinion Below 2

Jurisdiction 2

Statement of the Case 2

Reasons for Granting the Writ:

I. INTRODUCTION 5

II. REASONS FOR GRANTING THE WRIT 7

III. THE COURT OF APPEALS HAS CREATED AN EXCEPTION WHICH WILL SWALLOW THIS COURT'S CLASS ACTION TOLLING DOCTRINE 8

IV. THE HOSTILITY OF SOME LOWER FEDERAL COURTS TO THIS COURT'S CLASS ACTION TOLLING DOCTRINE, AS EVIDENCED BY THE COURT OF APPEALS' AND DISTRICT COURT'S DECISIONS BELOW, HAVE CREATED UNCERTAINTY AS TO THE LAW AMONG COURTS AND LITIGANTS AND HAS THEREFORE EFFECTIVELY UNDERMINED IF NOT NULLIFIED THIS COURT'S DOCTRINE AND POLICY 11

Conclusion 15

Page

Appendix—

Opinion from the United States Court of Appeals for the Tenth Circuit in *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (1994), which is being appealed A1

Oral ruling from the Reporter's Transcript of Proceedings in the United States District Court for the District of New Mexico in *Sawtell v. E.I. du Pont de Nemours & Co.*, No. CIV 90-920 JC/RWM A11

Excerpts from Plaintiff's First Amended Complaint, filed March 31, 1989, in *Blaschke-Mansfeldt v. Vitek, Inc.*, No. 89-1534 (Minn. 4th Jud. Dist. Ct.) A13

Excerpts from Complaint, filed May 4, 1989, in *Monsaas v. Vitek, Inc.*, No. 89-7382 (Minn. 4th Jud. Dist. Ct.) A15

Notice of Filing Notice of Removal, June 9, 1989, in *Monsaas v. Vitek, Inc.*, No. 89-7382 (Minn. 4th Jud. Dist. Ct.) A17

Notice of Motion and Motion, Sept. 29, 1989, in *Blaschka-Mansfeldt v. Vitek, Inc.*, No. 89-1534 (Minn. 4th Jud. Dist. Ct.) A18

Notice of Motion and Motion to Stay Vitek's Motion to Dismiss the Class Allegations or in the Alternative Certify as a Class Action, April 11, 1990, in *Dietz v. Vitek, Inc.*, No. 3-89-711 (D. Minn.) A20

Page

Memorandum of Law, April 11, 1990, in *Dietz v. Vitek, Inc.*, No. 3-89-711 (D. Minn.) A22

Notice of Motion and Motion to Stay Vitek's Motion to Dismiss the Class Allegations or in the Alternative Certify as a Class Action, April 11, 1990, in *Monsaas v. Vitek, Inc.*, No. 3-89-385 (D. Minn.) A23

Order, April 24, 1990, in *Monsaas v. Vitek, Inc.*, No. 3-89-385 (D. Minn.) A24

Order and Memorandum, May 24, 1990, in *Blaschka-Mansfeldt v. Vitek, Inc.*, No. 89-1534 (D. Minn.) A26

TABLE OF AUTHORITIES

Page

CASES:

Adams Public School Dist. v. Asbestos Corp. Ltd., 7 F.3d 717 (8th Cir. 1993) 13, 14

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) 3, 8, 11

Bieneman v. City of Chicago, 838 F.2d 962 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) 9

Blaschke-Mansfeldt v. Vitek, Inc., No. 89-01534 (Minn. 4th Jud. Dist. filed Mar. 31,1989) 3

Byrd v. Travenol Laboratories, 675 F. Supp. 342 (N.D. Miss. 1987) 10

Chardon v. Fumero-Soto, 462 U.S. 650 (1983) 14

Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983) 3, 8, 11, 12

Davis v. Bethlehem Steel Corp., 600 F. Supp. 1312 (D. Md. 1985) 10

Dietz v. Vitek, Inc., No. 3-89-711 (D. Minn.) 4

Fleming v. Bank of Boston Corp., 127 F.R.D. 30 (D. Mass. 1989) 13

Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975) 13

In re Agent Orange Prod. Liab. Litig., 818 F.2d 210 (2d Cir. 1987) 13

In re Elscint, Ltd. Sec. Litig., 674 F. Supp. 374 (D. Mass. 1987) 13

Magana v. Platzer Shipyard, 74 F.R.D. 61 (S.D. Tex. 1977) 9, 10

Monsaas v. Vitek, Inc., No. 3-89-385 (D. Minn.) 4

Pasternak v. Colonial Realty/USA Corp., No. H-90-829 (JAC), 1994 WL 170703 (D. Conn. Apr. 11, 1994) 13

Rose v. Arkansas Valley Envtl. & Util Auth., 562 F. Supp. 1180 (W.D. Mo. 1983) 13

Sawtell v. E.I. du Pont de Nemours & Co., 22 F.3d 248, 253 (10th Cir. 1994) 3

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 10

West Haven School Dist. v. Owens-Corning Fiberglass, 721 F. Supp. 1547 (D. Conn. 1988) 10

STATUTES AND RULES:

28 U.S.C. § 1254 2

28 U.S.C. § 1332 2

Fed. R. Civ. P. 23 . . . . . 8, 9, 10

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Sarah Ashby Sawtell, respectfully requests that this Court issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above proceeding on April 19, 1994.

OPINION BELOW

The opinion of the Tenth Circuit is reported at 22 F.3d 248, and is reproduced in the appendix to this petition at A1 through A10.

JURISDICTION

The judgment to be reviewed was entered on April 19, 1994. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254. The basis for federal jurisdiction in the district court was 28 U.S.C. § 1332.

STATEMENT OF THE CASE

Sarah Sawtell suffered excruciating pain and permanent disfigurement as a result of the surgical insertion of a temperalmandibular joint ("TMJ") prosthesis in her jaw. The prosthesis was manufactured by Vitek, Inc., out of DuPont's "Teflon." DuPont knew at the time it sold its Teflon to Vitek that Teflon in such a prosthesis would cause disfiguring injuries and pain, but knowingly sold it to Vitek anyway and took no steps to warn the public or the maxilo-facial surgery profession of the dangers posed by Vitek's use of duPont's Teflon in such prostheses.

On April 14, 1989, Sawtell, a resident of New Mexico, sued Vitek alone. Vitek took bankruptcy shortly thereafter. On September 20, 1990, after learning that the offending component of the Vitek product was made from DuPont's Teflon, Sawtell sued DuPont in federal district court in New Mexico on theories of negligence and product liability pursuant to the district court's diversity jurisdiction under 28 U.S.C. § 1332.

DuPont defended on the ground, among others, that Sawtell's claim was barred by New Mexico's three-year statute

of limitations. DuPont alleged that Sawtell had known of her injury by the late spring of 1987, more than three years before filing her complaint.

In response to DuPont's Motion for Summary Judgment on its limitations defense, Sawtell submitted copies of two class action complaints[1] filed against DuPont and others in Minnesota in the spring of 1989[2] on behalf of "all persons who now are or have been recipients of surgical implants of Vitek's Proplast TMJ Interpositional Implants, and who have suffered damage as a result of the implantation of the device." Sawtell, as such a recipient, would have been a member of the class.

On the basis of her status as a member of the putative class alleged in the Minnesota complaints, Sawtell claimed the protection of this Court's class action tolling doctrine which holds that "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action'. . . [and] remains tolled . . . until class certification is denied."[3]

In reply, DuPont submitted a copy of a class certification motion filed on September 29, 1989,[4] in *Blaschka-Mansfeldt v.*

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[1] *Blaschke-Mansfeldt v. Vitek, Inc.*, No. 89-01534 (Minn. 4th Jud. Dist. filed Mar. 31,1989) (reproduced in pertinent part at A13; *Monsaas v. Vitek, Inc.*, No. 89-8382 (Minn. 4th Jud. Dist. filed May 4, 1989) (reproduced in pertinent part at A15).

[2] At least one such class action was filed in state court in Minnesota, *see* A15—the *Monsaas* complaint), which DuPont then removed to federal district court on grounds of diversity (see A17—*Monsaas* Notice of Filing Notice of Removal).

[3] *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983) (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

[4] The court of appeals, in its opinion below, stated erroneously that the motion to certify had been filed a month after the complaint had been filed. *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248, 253 (10th Cir. 1994) (*see* A9).

Vitek, Inc, one of the Minnesota class actions.[5] In the motion, Blaschka-Mansfeldt sought to narrow the class for which she sought certification, limiting it to fewer people than the class originally alleged in her class action complaint. Instead of pursuing a class action on behalf of "all" recipients as she had alleged in her complaint, Blaschka-Mansfeldt moved for certification of a class of Minnesota residents only.[6] About seven months later, the plaintiffs in the other two pending class actions filed motions for certification of only "Minnesota" classes.[7] On April 20, 1990, the federal court in Minnesota denied the motion for class certification in the *Monsaas* case.[8] A state court denied certification in the *Blaschka-Mansfeldt* case on May 24, 1990.[9]

On July 30, 1992, the district court below granted DuPont's motion for summary judgment against Sawtell, holding (1) the class action tolling doctrine should not apply in diversity cases if the relevant state courts have not adopted and would not adopt it; (2) the tolling doctrine should not apply in the context of "mass tort" litigation and; (3) Sawtell had tacitly opted out of the class against DuPont because she had earlier filed an individual claim against Vitek alone. (*See* petitioner's appendix at A11-A12.

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[5] Reproduced in petitioner's appendix at A18-A19.

[6] There is no evidence in this record regarding the circumstances of or motivation underlying Blaschka-Mansfeldt's decision to pursue the narrower class.

[7] *Dietz v. Vitek, Inc.*, No. 3-89-711 (D. Minn.); *Monsaas v. Vitek, Inc.*, No. 3-89-385 (D. Minn.). The motions to certify the class in both cases were filed on April 11, 1990, and are reproduced in petitioner's appendix at A20-A22 and A23, respectively.

[8] *See* petitioner's appendix at A24-A25.

[9] *See* petitioner's appendix at A26.

Sawtell appealed, arguing that the district court's limitations on the class action tolling doctrine directly contradicted this Court's repeated statements regarding the doctrine's scope.

The court of appeals affirmed, but on a different theory than those on which the district court had based its decision. The court of appeals held that the class plaintiff's motion in *Monsaas* to certify the narrower class of Minnesota recipients established that Sarah Sawtell had never been a putative member of the class, notwithstanding that the class plaintiffs had sued on behalf of "all recipients." In support of this conclusion, the court of appeals held that Sawtell had failed to prove with extrinsic evidence that she had been a putative member of the classes alleged in the Minnesota cases.

If Sawtell is entitled to tolling during the period delineated by the filing of the class action complaint and the denial of class certification, as required by this Court's decisions in *American Pipe* and *Crown, Cork & Seal*, her complaint against DuPont was unquestionably timely. If she is entitled only to the period delineated by the filing of the class complaint and the filing of the motion to certify a narrower class, her complaint is also timely. If she is not entitled to any tolling, then her complaint is untimely.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Sarah Sawtell was blindsided below by a novel and wholly insupportable exception to this Court's class action tolling doctrine: Although she was a member of a putative class as stated in the class complaint and would routinely have been entitled to tolling during the pendency of the class action allegations in Minnesota, the Tenth Circuit denied her any tolling at all. It did so simply because the named plaintiffs in the Minnesota classes made a strategic decision, unknown and unannounced to Sawtell,

to move for certification of a narrower class than the class they had originally pled. To add insult to injury, the Tenth Circuit purported to justify its decision on Sawtell's failure at the trial court level to introduce extrinsic evidence that the plaintiffs in Minnesota intended her to be a member of their class actions, even though the complaints filed in those cases and part of the record evidence before the district court below explicitly and clearly announced Sawtell as a member of the class, as pled. *See* petitioner's appendix at A13. A15.

This Court should grant Sawtell's petition because the court of appeals' decision below disregards and undermines this Court's class action tolling doctrine and evinces a purposeful hostility to that doctrine and the policies it implements. The indisputable policy underlying this Court's class ation tolling docrine is to forestall individual plaintiffs, like Sawtell, from filing a flood of individual actions to protect themselves from the possible running of limitations periods while a putative class action is pending. If permitted to stand, the court of appeals' decision below will reach the opposite result and as a practical matter make this Court's announced policy obsolete. Any prudent attorney who represents an individual who is a member of a putative class and who considers the court of appeals' decision in *Sawtell* will be compelled to file a protective, individual claim in order to avoid the pitfall which the court of appeals created for Sawtell. This is so because the decision below permits the retroactive elimination of all tolling in the event that a narrower class is even so much as requested.[10]

The decision of the court of appeals below is just one example of a growing body of lower court opinions waging war

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[10] A decision which limited tolling to the period between the filing of the complaint and a motion to certify a narrower class would be erroneous but would have some logical support. A decision which deprives individual litigants of *all* tolling simply because the class plaintiff later moves to certify a narrower class is not just contrary to the letter and spirit of the Court's decisions; it is mean-spirited and entirely without logic.

on this Court's class action tolling doctrine. This war of attrition is having the effect of nullifying the holdings of this Court and the important policies those holdings reflect. This Court should grant this petition to take the opportunity to reaffirm this Court's longstanding class action tolling doctrine and to make clear that the limitation reflected by the decision below and other decisions are improper and contrary to that doctrine.

II. REASONS FOR GRANTING THE WRIT.

This Court should grant Sarah Sawtell's petition for the following reasons:

1. The court of appeals below has decided a question in a way that conflicts with applicable decisions of this Court. Specifically, the decision of the court of appeals contradicts this Court's class action tolling doctrine.

2. The court of appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Specifically, the court of appeals, in an unprecedented effort to arbitrarily limit the scope of the tolling doctrine, has now assigned to individual plaintiffs a burden of "proving" that they were members of a putative class even when their status as such is clear from the face of the relevant class complaint, part of the record in this case.

3. The decisions of the court of appeals and district court reflect a hostility toward this Court's class action tolling doctrine which other courts have evinced as well, creating a split among the circuits. This Court should grant the petition in this case in order to reaffirm and clarify that its intent in adopting the doctrine was to discourage individual litigation and to extend tolling to *all* putative members of alleged classes. Furthermore, this Court should use this case to affirm that it has not authorized haphazard and arbitrary exceptions to the doctrine.

4. Unless reversed, the decision below will cause havoc in the application of the class action tolling doctrine: The decision's practical effect will be to require putative class plaintiffs to file protective, individual lawsuits out of concern that the named class plaintiff may do something later in the litigation which will cause the complete loss of tolling or that another court may later determine that the putative plaintiff prove membership in the alleged class through extrinsic evidence. This is an outcome which this Court intended to prevent when it established the class action tolling doctrine.

III. THE COURT OF APPEALS HAS CREATED AN EXCEPTION WHICH WILL SWALLOW THIS COURT'S CLASS ACTION TOLLING DOCTRINE.

The class action tolling doctrine is straightforward: "'[T]he commencement of a class action suspends the applicable statute of limitations as to all *asserted* members of the class who would have been parties had the suit been permitted to continue as a class action.' Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983) (emphasis added) (quoting *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)). The purpose of the doctrine is equally straightforward. It is to lead members of the putative class away from filing individual actions which, if filed, would result in "a needless multiplicity of actions. . . ." *Crown Cork & Seal Co.*, 103 U.S. at 351. The tolling doctrine thereby fosters and advances the important purpose of Rule 23. The doctrine accomplishes this end only by persuading putative class members that their limitations periods are not expiring and therefore that they have no need to file suit.

While the goal of the doctrine may be "to prevent a needless multiplicity of actions," this goal cannot be met if asserted

members of classes are forced to worry that courts may not apply the doctine to them for reasons which are not evident in this Court's articulation of the doctrine. In Sarah Sawtell's case, there is no doubt that she was a member of the class which the Minnesota plaintiffs described in their complaints: the named plaintiffs sued on behalf of "all" recipients of the implant and Sawtell was such a recipient. The Minnesota plaintiffs later moved to certify a narrower class consisting of Minnesota recipients only. The Tenth Circuit Court of Appeals seized on this motion as a basis to deny tolling as to Sawtell. The court of appeals reasoned that the motion to certify the narrower class evinced that the named plaintiffs' original intent was to sue only on behalf of the narrower class, notwithstanding the language of their complaints.

The court of appeals below thus transformed the application of the tolling doctrine from a straightforward process of comparison of the alleged class with the circumstances of the individual plaintiff into one whose outcome may be affected by strategic decisions of class counsel, which are not authorized by the court before which the class action is pending. Such an outcome not only is at war with this Court's decisions in *American Pipe* and *Crown, Cork & Seal*, but conflicts with the accepted tenet of class action jurisprudence that, once a class action is filed, it cannot be dismissed or compromised without the explicit approval of the court. *See, e.g., Bieneman v. City of Chicago*, 838 F.2d 962 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989)[11]; *Magana v. Platzer Shipyard*, 74 F.R.D. 61

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[11] "If a complaint includes a class allegation, the district court *must* address it, no matter what the parties later do. Otherwise, the plaintiff could withdraw as representative unilaterally, or the parties could settle the case without the court's permission. Rule 23(e) forbids either course. If the complaint depicts the plaintiff as representative of a class, the district court must deal with the subject even if no one asks." 838 F.2d at 963-64.

(S.D. Tex. 1977).[12] Lower courts which have addressed the issue have concluded that tolling persists during an appeal of a denial of class certification.[13]

This Court, in analogous circumstances, has addressed the policy which underlies this case and with which the court of appeals has so clearly disagreed. In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, n.15 (1977), this Court addressed the timing of motions to intervene by putative class members who wished to appeal a denial of class certification. In concluding that it was appropriate to permit intervention after denial of certification, the Court commented on the illogic of a rule which required intervention after denial of certification but before final judgment:

> [S]uch a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. [citation omitted.] The result would be the very "multiplicity of activity which Rule 23 was designed to avoid."

Here, there is little difference between the Minnesota plaintiffs' decisions to pursue a narrower class and the plaintiffs' decision in *McDonald* not to appeal the denial of certification. In both cases, putative class members were effectively ousted by the unilateral decision of the class representative. While Sarah Sawtell did not appeal the Minnesota order denying class certification and did not intervene in order to assert the broader,

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[12] "[B]ecause the abuses which Rule 23(e) is designed to combat can occur prior to class certification, this Court holds that Rule 23(e) approval must be obtained for the propsed settlement of a named plaintiff's claim when the plaintiff has purported to represent a class that he now seeks to dismiss." 74 F.R.D. at 66.

[13] *See, e.g., Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312, 1316 (D. Md. 1985); *Byrd v. Travenol Laboratories*, 675 F .Supp. 342, 347 (N.D. Miss. 1987); *West Haven School Dist. v. Owens-Corning Fiberglass*, 721 F.Supp. 1547, 1555 (D. Conn. 1988).

nationwide class which was originally pled,[14] there is no support in this Court's decisions for the decision below to oust her completely from any of the protection to which she was entitled as a putative class member.

Finally, this Court, in *Crown, Cork & Seal Co.*, made it clear that the key document for determing the identity of the individuals who are entitled to tolling is the complaint because "a class *complaint* 'notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs. . . .'" 462 U.S. at 353 (emphasis added). Under this language a court might accept evidence from a defendant that the complaint in a class action failed to give the defendant notice of the number and generic identities of the potential plaintiffs. DuPont introduced no such evidence below. But there is no justification for the court of appeals' decision in this case to require the plaintiff to prove that in the state of the named plaintiffs' minds those plainttiffs meant "all recipients" when they said "all recipients" in their complaint.

IV. THE HOSTILITY OF SOME LOWER FEDERAL COURTS TO THIS COURT'S CLASS ACTION TOLLING DOCTRINE, AS EVIDENCED BY THE COURT OF APPEALS' AND DISTRICT COURT'S DECISIONS BELOW, HAVE CREATED UNCERTAINTY AS TO THE LAW AMONG COURTS AND LITIGANTS AND HAS THEREFORE EFFECTIVELY UNDERMINED IF NOT NULLIFIED THIS COURT'S DOCTRINE AND POLICY.

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[14] There is no evidence in this record that Sarah Sawtell was aware of the Minnesota actions. Rather, she was and should continue to be in the role of a "passive beneficiary" of the *American Pipe* tolling doctrine who had no "duty to take note of the suit or to exercise any responsibility with respect to it. . . ." 414 U.S. at 552.

The articulated policy which underlies the class action tolling doctrine is to forestall the filing of a multiplicity of protective individual suits by encouraging litigants to rely on the tolling of the statute of limitations so that they can await the outcome of the class action motion. *Crown, Cork & Seal, Inc. v. Parker*, 462 U.S. 345, 349. 351 (1983). The decsions of the court of appeals and the district court below in this case are reflective of a growing judicial hostility to the tolling doctrine and its underlying policy. This growing hostility has sowed confusion among the lower federal courts. This hostility and confusion, in turn, can only undermine the class action tolling doctrine itself, by causing uncertainty among litigants and their counsel. The goal of the tolling doctrine—encouraging litigants to hold off filing protective individual suits—can be accomplished only if the litigants feel that they can rely on the tolling doctrine's application. The hostility and confusion, evinced by the decisions below and others, undermines that confidence and thereby defeats the tolling doctrine and its policy.

The decisions of the district court and court of appeals in this case reflect the different ways in which the lower federal courts have sought to overturn this Court's class action tolling doctrine and the confusion that has been created among the courts. Thus, between the two courts below, they came up with four reasons not to apply the tolling doctrine:

(1) The tolling doctrine should not be applied by the federal court in a diversity action if the applicable state law would not recognize tolling. This reason was advanced by the district court below.

(2) The tolling doctrine should not apply in "mass torts" cases. This reason was advanced by the district court.

(3) Sawtell implicitly "opted out" of the putative Minnesota class actions by filing her individual claim against Vitek, a wholly separate defendant. This reason was advanced by the district court.

(4) The attempted narrowing of the class in the Minnesota class actions retroactively deprived Sawtell of her status as a putative member of the class. This reason was advanced by the court of appeals.

This "grab bag" of reasons not to apply the tolling doctrine—as well as reasons advanced by other courts[15]—is reflective of both the hostility to the tolling doctrine growing among the lower courts and the confusion among the courts that has been created. Thus, the first reason above—not applying the doctrine in diversity cases—has created a conflict among the courts that have considered the question. The Secont Circuit, in *In re Agent Orange*, in dictum, expressed its view that, in diversity cases, the tolling doctrine should not apply where the state would not adopt the doctrine. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 213 (2d Cir. 1987). Other circuits have come to the opposite conclusion. In *Adams Public School Dist. v. Asbestos Corp., Ltd.*, 7 F.3d 717 (8th Cir. 1993), the Eighth Circuit reached the opposite conclusion, also in dictum: "[W]e view the federal interest here as sufficiently strong to

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[15] For example, some courts have held that the tolling doctrine does not extend to members of a putative class if the named plaintiff is determined not to have had standing to represenmt the claims of the class; other courts have held the contrary. In *Pasternak v. Colonial Realty/USA Corp.*, No. H-90-829 (JAC), 1994 WL 170703, *5 (D. Conn. Apr. 11, 1994), Judge Cabranes held that lack of standing in the named plaintiff defeats *all* tolling for the members of the alleged class. The same result was reached by the Court in *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987), in which the court stated that this Court had failed to address the issue in its decisions on class action tolling and concluded that tolling resulting from a class complaint filed by a plaintiff who lacked standing would "encourage abuse." *See also Fleming v. Bank of Boston Corp.*, 127 F.R.D. 30, 36, 37 (D. Mass. 1989).

Other courts have come to the opposite conclusion. *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1098 (3d Cir. 1975) (permitting the addition of another plaintiff who had standing and holding that the original filing had tolled the limitations period for the added plaintiff); *Rose v. Arkansas Valley Envtl. & Util Auth.*, 562 F. Supp. 1180, 1193 (W.D. Mo. 1983) (holding that lack of standing of class representative does not prevent class action tolling).

justify tolling in a diversity case when the state law provides no relief." 7 F.3d at 719. In his dissent in *Chardon v. Fumero-Soto*, 462 U.S. 650 (1983), Justice Rehnquist, joined by Justices Powell and White, noted in passing that "[i]f the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable." 462 U.S. at 667.

While both *Agent Orange* and *Adams* addressed this issue in dictum only, the diverse views on this subject are particularly significant in this case, given the policy goals underlying this Court's adoption of the doctrine. This is so because the doctrine is not self-enforcing in its most important respect: It requires the voluntary cooperation of litigants in refraining from filing individual lawsuits while a class action complaint is pending. In order to accomplish that end, courts must be prepared to reassure litigants and their attorneys that the doctrine will be enforced in their cases. Without that confidence, litigants and lawyers will inevitably feel constrained to file protective, individual actions.

With this confusion prevailing in the lower courts, what are prudent litigants and their lawyers to do? How is one to know that a filed complaint seeking a class will result in the application of the tolling doctrine or the withdrawel of the tolling doctrine under one of these growing number of "reasons" not to apply it? How does one know that an attempt to narrow the class will not retroactively bar the application of the tolling doctrine, as held by the court of appeals below? This confusion and the uncertainty it creates in litigants can mean only that the prudent litigant *must* file individual protective suits. This is precisely the result which *Crown, Cork* wished to avoid. There can be no substitute for this Court's taking up the question, reaffirming the holding and principle of *Crown, Cork*, and setting forth clearly the bright line rule which is necessary to preserve the tolling doctrine and the important policy it represents.

CONCLUSION

For all the above reasons, Sawtell respectfully requests that this Court grant her petition for writ of certiorari and direct the court of appeals below to certify the record in this case to this Court and thereby review the judgment and opinion of the court of appeals below.

Respectfully submitted,

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APPENDIX

SAWTELL *v.* E.I. DU PONT DE NEMOURS & CO.
22 F.3d 248

United States Court of Appeals
for the Tenth Circuit
Civil No. 92-2208

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
No. CIV-90-920-JC/RWM

Decided April 19, 1994.

John W. Boyd (Joseph Goldberg with him on the briefs) of Freedman, Boyd, Daniels, Peifer, Hollander, Guttmann & Goldberg, Albuquerque, New Mexico, for Plaintiff-Appellant.

Kenneth L. Harrigan (Kathryn D. Lucero of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico; Barry Fish and Janet Napolitano of Lewis and Roca, Phoenix, Arizona, with him on the briefs) of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico, for Defendant-Appellee.

Before ANDERSON, TACHA and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

Sarah Ashby Sawtell appeals from a summary judgment for the defendant E.I. du Pont de Nemours and Company ("DuPont"). Her complaint in this diversity action alleged claims in products liability. The corpus of her claims was that

DuPont manufactured polymers inappropriately used in temporomandibular joint prostheses causing a foreign body reaction. The foreign body reaction resulted in bone degeneration, extreme pain, and five operations for Ms. Sawtell.

The district court granted DuPont's summary judgment motion and dismissed the action as time barred by the New Mexico three-year statute of limitations. N.M. Stat. Ann. § 37-1-8 (Michie 1990 Repl.).[1] The district court specifically concluded, in the oral ruling, Ms. Sawtell knew or should have known she had been injured by the implants more than three years before she sued DuPont.

On appeal, Ms. Sawtell argues the proper time of accrual of her claim was when she first knew or should have known her injuries were caused by DuPont's wrongful conduct. She also claims summary judgment was improper because there exist disputes as to material issues of fact. Finally, she argues the district court erred in refusing to toll the action while a similar class action was filed in Minnesota. She seeks reversal of the district court's order of dismissal but also moves for certification of this matter to the New Mexico Supreme Court.

I.

Ms. Sawtell asks this court, under New Mexico law, to apply the "discovery" rule to products liability actions. She argues on appeal the district court misapplied the rule by determining the statute of limitations began to run at the time she knew that her implants caused her injuries. Although New Mexico courts have not yet addressed the application of the discovery rule in products liability actions, we can anticipate the reaction of the New Mexico courts by the principles of New Mexico case law. We also may examine decisions from other jurisdictions to

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[1]37-1-8. Actions against sureties on fiduciary bonds; injuries to person or reputation.

Actions must be brought ... for an injury to the person or reputation of any person, within three years.

anticipate what the New Mexico courts would do if faced with this particular problem. *Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Continental Ins. Co.*, 891 F.2d 772, 774 (10th Cir. 1989).

Historically, statutes of limitations began to run on a plaintiff's cause of action against the wrongdoer. However, courts have realized that a plaintiff may, for various reasons, lack the knowledge necessary to understand that legal damage has occurred. A discovery rule delays the accrual of a cause of action. Thus, under a typical discovery rule, the statute of limitations begins to run at the time the plaintiff knew or with reasonable diligence should have known of the damage and the cause of the damage.

State courts first applied the discovery rule in medical malpractice cases because the injuries or causes of the injuries in medical malpractice are frequently difficult for plaintiffs to discern. *See Roberts v. Southwest Community Health Serv.*, 837 P.2d 442 (N.M. 1992). Some state courts further applied the discovery rule to other claims commonly resting on a plaintiff's blameless ignorance of the damage at the time of the defendant's wrongful action. For example, the discovery rule has been applied in professional malpractice suits,[2] negligence actions involving latent diseases,[3] defamation actions if publication was

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[2] *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, (No. 70410) 1994 WL 12495 (Ill. Jan. 20, 1994) (legal malpractice); *Leonhardt v. Atkinson*, 289 A.2d 1 (Md. 1972) (accounting malpractice); *Steelworkers Holding Co. v. Menefee*, 258 A.2d 177 (Md. 1969) (architectural malpractice); *Mattingly v. Hopkins*, 253 A.2d 904 (Md. 1969) (engineering malpractice); *Grunwald v. Bronkesh*, 621 A.2d 459 (N.J. 1993) (legal malpractice).

[3] *Harig v. Johns-Manville Prods. Corp.*, 394 A.2d 299 (Md. 1978) (latent disease from exposure to asbestos in the work place).

secretive,[4] negligent cancellation of insurance policy suits,[5] and in suits alleging childhood sexual abuse.[6]

State courts have taken a variety of stances in products liability cases. Some states still apply the statute of limitations in its traditional way. In these states, the statute of limitations begins to run when the defendant committed the wrongful act or when the plaintiff was injured regardless of when the plaintiff became aware of the wrongful act or the injury. *See, e.g., Atwood v. Sturm, Ruger & Co.*, 823 P.2d 1064 (Utah 1992) (accrual on date of the injury); *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535 (N.D. 1990) (accrual of statute of limitations at the time of the injury.[7] In most states, however, a plaintiff's lack of knowledge of a product's defect causing personal injury affects the statute of limitations if a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause. *See, e.g., Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704 (Miss. 1990) (en banc) (involving latent diseases). In these cases, the cause of action begins to accrue when the injured person knew, or by the exercise of reasonable diligence should have discovered, the defect or the cause of the injury. *E.g., Burgess v. Eli Lilly &*

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[4] *Staheli v. Smith*, 548 So.2d 1299 (Miss. 1989) (if the publication was secretive or inherently undiscoverable then accrual occurs at the time the plaintiff should have discovered the defamation).

[5] *Gazija v. Nicholas Jerns Co.*, 543 P.2d 338 (Wash. 1975) (discovery rule is appropriate due to the fiduciary relationship).

[6] *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. Ct. App. 1990); *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. App. 1988); *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. App. 1987); *see also Callahan v. State*, 464 N.W.2d 268 (Iowa 1990); *Peterson v. Bruen*, 792 P.2d 18 (Nev. 1990).

[7] *See also, Wojcik v. Almase*, 451 N.E.2d 336 (Ind. App. 1983) (accrual occurs at the time of the injury not at the time of the discovery of harm; accrual occurs when all elements of the products liability cause of action are met); *Bates v. Little Co. of Mary Hosp.*, 438 N.E.2d 1250 (Ill. App. 1982) (if it was a traumatic event, then accrual of the action is at the time of the injury).

Co., 609 N.E.2d 140 (Ohio 1993).[8] Similarly, if there is fraudulent concealment of the defect in the product, then the statute of limitations does not begin to run until the fraudulent concealment should have been discovered. *See Palmer v. Borg-Warner Corp.*, 838 P.2d 1243, 1251 (Alaska 1992).

The New Mexico Supreme Court has recently adopted the discovery rule in medical malpractice cases. *See Roberts*, 837 P.2d 442. In *Roberts*, the court declared it was joining the majority of jurisdictions by recognizing "the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists." *Id.* at 449. The

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[8] *See also Miller v. Armstrong World Indus.*, 817 P.2d 111 (Colo. 1991) (en banc) (an asbestos products liability case in which the statute of limitations begins to run when the plaintiff knew or should have known of all material facts essential to show the elements of the cause of action and not at the mere discovery of the physical process leading to the injury); *Franzen v. Deere & Co.*, 334 N.W.2d 730 (Iowa 1983) (in a products liability suit the cause of action accrues upon the discovery of the defect); *Pennwalt Corp. v. Nasios*, 550 A.2d 1155 (Md. 1988) (medical products liability suit, the cause of action accrues when the plaintiff knew or should have known he has a cause of action, i.e., when he has knowledge of probable manufacturer wrongdoing or product defect that probably caused the injury); *Moll v. Abbott Labs.*, 506 N.W.2d 816 (Mich. 1993) (in a pharmaceuticals products liability suit the cause of action accrues upon the discovery of the injuries and the discovery of a causal connection between the injury and the defendant's breach of duty); *Anthony v. Abbott Labs.*, 490 A.2d 43 (R.I. 1985) (in a drug products liability case, the action accrues at the time the plaintiffs know of or with reasonable diligence would have known of the wrongful conduct of the manufacturer); *White v. Johns-Manville Corp.*, 693 P.2d 687 (Wash. 1985) (en banc) (in a products liability and asbestosis suit, the discovery rule is applicable because of the latent nature of the injury); *Ohler v. Tacoma Gen. Hosp.*, 598 P.2d 1358 (Wash. 1979) (en banc) (discovery rule applies in products liability cases if the product was medical in nature whose causal connection to the injuries may not be discovered until well after the product has been in use); *Hickman v. Grover*, 358 S.E.2d 810 (W. Va. 1987) (the action accrues at the time the plaintiff knew or should have known he has been injured, the identity of the product's maker, and the product's causal relation to the injury); *Doe v. American Nat'l Red Cross*, 500 N.W.2d 264 (Wis. 1993) (a tainted blood transfusion products liability suit, the statute of limitations begins to run upon the discovery of the injury not on the date of the injury).

court focused on the majority position of other jurisdictions and on policy concerns to reach its decision to use the discovery rule in medical malpractice suits. *Id.* at 450 (the court's concerns of basic fairness to the defendant is balanced against the awareness that an injury may "not necessarily manifest itself at the time of the negligent act. . . . [And a plaintiff] may be unable to ascertain the cause of th[e] pain.").

Products liability suits are similar to medical malpractice suits: many jurisdictions have extended the discovery rule to products liability cases and products liability cases include many of the same policy concerns found in medical malpractice suits. Based on these coincidences, we could conclude the New Mexico Supreme Court would eventually adopt/use the discovery rule in products liability cases as well as medical malpractice actions. However, since the New Mexico Supreme Court extended the discovery rule to medical malpractice cases so recently, it seems unlikely that the state would be applying it in products liability cases so soon. The *Roberts* court noted that New Mexico does not extend the discovery rule in other malpractice actions. *Id.* at 449 n.8. Also, the New Mexico Supreme Court stated a cause of action for personal injury not involving medical malpractice accrues at the time of the injury.[9] *Roberts*, 837 P.2d at 449.

We need not resolve whether New Mexico would apply the discovery rule in medical products liability suits, however, because even with the discovery rule Ms. Sawtell's action accrued more than three years before she initiated her lawsuit. For this same reason, we need not certify the question of controlling state law to the New Mexico Supreme Court.

In early 1984, after experiencing severe jaw pain, Ms. Sawtell had her natural menisci from her left and right

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[9] "'[T]he limitation period begins to run from the time the injury manifests itself in a physically objective manner and is ascertainable.'" *Crumpton v. Humana, Inc.*, 661 P.2d 54, 55 (N.M. 1983) (quoting *Peralta v. Martinez*, 564 P.2d 194, 197 (N.M. Ct. App. 1977) (emphasis in the original)).

temporomandibular joint replaced with prostheses manufactured by Vitek. Within several months after the operation, Ms. Sawtell's acute jaw pain returned. Her doctor replaced the implants with different Vitek prostheses in December of 1984, but this did not permanently eliminate her pain. Ms. Sawtell's doctor noticed her bone was degenerating, and he tried to alleviate her pain through another operation and through the use of narcotics. Ms. Sawtell consulted with the Mayo Clinic in June 1987. Then in September of 1987, Ms. Sawtell had two operations to remove the Vitek prostheses and to implant bone grafts.

In April 1989, Ms. Sawtell sued Vitek claiming damages for personal injuries arising from defects in Vitek's implants. During the course of discovery in that litigation, Ms. Sawtell learned Vitek created the prosthesis material, trade name of Proplast®, from a DuPont polymer, trade name of Teflon®. On September 20, 1990, after Vitek declared bankruptcy, Ms. Sawtell sued DuPont alleging DuPont's polymers were the cause of her injuries.

Looking at the record in the light most favorable to Ms. Sawtell and applying her version of the discovery rule for products liability suits, she still fails to state a cause of action. Summary judgment based on the statute of limitation was proper. The undisputed evidence indicates Ms. Sawtell had enough facts to make out the defect "element" of her products liability cause of action. She should have known the specific cause of her injuries before September 1987.

By September 1987, Ms. Sawtell had undergone three operations on her temporomandibular joint and was in the midst of having the prostheses permanently removed. She had been told by her doctor the implants caused a foreign body reaction, and in June she met with specialists at the Mayo Clinic who determined the source of her injuries was the Proplast®/Teflon® implants. With reasonable diligence Ms. Sawtell should have known, if she did not already know, the specific cause of her pain and suffering before September 1987. Ms. Sawtell's

conclusory claim that she did not actually know is insufficient to defeat the summary judgment motion. Actual knowledge under any of the proposed discovery rules is not required to accrue the cause of action if the plaintiff "should have known."

What a plaintiff should have known is a factual question usually reserved for the jury. *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985). However, if the essential facts are undisputed and allow only one conclusion, the plaintiff would have known with reasonable diligence the cause of the implants' defect by September 1987, then summary judgment is proper. *See id.* at 1387. Based on the record, reasonable minds may not differ that Ms. Sawtell knew or should have been aware the Proplast®/Teflon® caused her injury. There are no material facts in dispute; therefore, we affirm the district court's grant of summary judgment.

II.

Ms. Sawtell next argues the running of the statute of limitations should have been tolled under the "equitable tolling" doctrine of *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), while a similar class action suit was pending in Minnesota. If the district court's refusal to toll the statute of limitations resides in the grant of summary judgment, we review the refusal de novo. *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 860 (10th Cir. 1993).

Discussing the "equitable tolling" doctrine in *American Pipe*, the Supreme Court sought to enhance judicial economy by eliminating the need to file duplicative or protective motions to intervene in class actions before the statute of limitations expired. 414 U.S. at 550-51. The doctrine suspends application of the statute of limitations to putative class members while a decision on class certification is pending. *Id.* at 554. Although the court's decision in *American Pipe* concerned only those who sought to intervene, the Court later broadened the "equitable tolling" doctrine to toll the statute of limitations for all potential class members. *Crown, Cork & Seal Co. v.*

Parker, 462 U.S. 345, 350 (1983). The filing of a class action suit tolls the statute of limitations for all asserted class members, and the statute of limitations remains tolled "until class certification is denied." *Id.* at 353-54.

Between March 1989 and May 1990, three class action suits against Vitek and DuPont were filed in Minnesota. These class actions alleged personal injuries from Proplast®/Teflon® temporomandibular implants. The plaintiffs in each case moved for certification of a class consisting solely of persons who received the implants in Minnesota. The motions for class certification were denied in April and May 1990.

Counsel for the Appellee argues *American Pipe* does not apply to a state claim heard in a federal court solely on diversity grounds because no great federal interest compels the use of federal equitable tolling principles. We need not resolve this question, which is currently disputed among the circuits, of the effect of *American Pipe* on federal diversity suits because Ms. Sawtell was not a putative member of the Minnesota class action.

The evidence before this court indicates the class was intended to be Minnesota residents only. The class action suits were initiated within the Minnesota state court system and pursuant to the Minnesota class action statute. The complaints did not specify a national class.[10] Although the complaints filed in the Minnesota class actions were broad in the descriptions of the class, when the plaintiffs moved for class certification a month later, the narrowness of the class definitions was clear. The plaintiffs moved to certify classes of "those who received the Proplast/Teflon Interpositional Implant in Minnesota."

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[10] The first complaint in Minnesota stated

> Plaintiff brings this action on behalf of herself and all other individuals similarly situated . . . . The Class consists of all persons who now are or have been recipients of surgical implants of Vitek's Proplast TMJ Interpositional Implants, and who have suffered damage as a result of the implantation of the device.

Ms. Sawtell has presented no evidence supporting the inference she was a putative member of the class.[11] She was a resident of New Mexico, and her operations were performed in New Mexico. The Minnesota actions were limited to Minnesota residents; therefore, Ms. Sawtell could not have joined the suits. The Supreme Court held "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" *Crown, Cork & Seal*, 462 U.S. at 353-54 (quoting *American Pipe*, 414 U.S. at 554). Ms. Sawtell would not have been a party to the Minnesota suits had any of them continued as a class action. The statute of limitations should not be tolled.

Unfortunately, Ms. Sawtell did not begin her suit within the statutory time frame. Accordingly, we **AFFIRM** the district court's order.

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[11] To avoid confusion, we note a federal district court in the northern district of Illinois dealt with the tolling question in a similar case. *See Ganousis v. E.I du Pont de Nemours & Co.*, 803 F.Supp. 149 (N.D. Ill. 1992) (in a products liability suit against DuPont involving the Proplast®/Teflon® implant, the plaintiff argued her suit was equitably tolled by the Minnesota class actions). The district court determined the Minnesota cases could toll the statute of limitations but only for one month. The court held the tolling period ceased at the time of the certification motion.

It is apparent from the *Ganousis* opinion, the district court had different evidence to consider than do we. We do not have evidence, beyond the complaints and the motions for class certification, of the motivation of the class action plaintiffs in defining the class. Even if we had evidence available to us to support an inference that Ms. Sawtell may have been a putative member of the class initially, one month would not salvage Ms. Sawtell's timing deficiencies. For these reasons, our ruling on the motion for summary judgment is unaffected by the district court's analysis in *Ganousis*.

SAWTELL *v.* E.I. DU PONT DE NEMOURS & CO.

United States District Court
for the District of New Mexico
No. CIV 90-920 JC/RWM

Excerpts from
REPORTER'S TRANSCRIPT OF PROCEEDINGS

July 30, 1992

For the Plaintiff: FREEDMAN, BOYD, DANIELS, PEIFER, HOLLANDER, GUTTMANN & GOLDBERG, P.A., Albuquerque, New Mexico (by Joseph Goldberg and John W. Boyd).

For the Defendant: MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A., Albuquerque, New Mexico (by Kenneth L. Harrigan and Janet Napolitano)

. . . .

THE COURT: I've carefully reviewed all the briefs and the submittals to me in this case, and I find that the plaintiff has failed to bring forth sufficient evidence for a reasonable juror to find that she did not know or could not reasonably have known that she had been injured by the implants by September 20th of 1987.

This is based on Dr. Carlberg's notes of the meetings he had with the plaintiff and her husband and other doctors March and April of 1987. The plaintiff herself highlighted the notes and summarized them May of '87, visited the Mayo Clinic in June of '87. The doctor at Mayo is a little equivocal, but it should have alerted her to the damage. Her husband knew from the discussions with Dr. Carlberg, and she could have reasonably ascertained from those same conversations what he did.

The affidavits I find to be conclusory and are insufficient to raise issues of fact. The deposition testimony of Mrs. Sawtell basically is that she can't remember; she doesn't know. It's not truly contradictory.

I don't find the action is tolled by the filing of the action in Minnesota. The Agent Orange case at 18 F.2d 210, at 213, talking about some Hawaii plaintiffs, they say, "In Hawaii, an action for personal injuries must be brought within two years after the cause of action accrues. The claim accrues under the statute when the plaintiff discovers or reasonably should have discovered the complained of act, the injury and the causal connection between the two." That and New Mexico law are extremely close to it. So it's applicable.

Then they say, "The limitation periods of American Pipe and Crown Cork were derived from federal statutes. Here we're dealing with Hawaii's limitation statutes. Because none of them provides for tolling in a situation such as exists here, it is doubtful that either American Pipe or Crown Cork can be treated as applicable precedent." I find that to be the situation here.

I also am not at all certain that American Pipe would be applicable in a mass tort injury such as we have here and that the defendant could be alerted to the damages of each possible plaintiff. The plaintiff continued in her lawsuit against Vitek and Dr. Holmsie [sic] at the same time it was going on in Minnesota, and she could have at that time joined the defendant Du Pont and did not do so. So I do not find the American Pipe decision controlling on this particular case.

This decision I reach somewhat reluctantly, but I think I have to under the facts as presented to me. We'll draw up the order, and the motion for summary judgment on the statute of limitations will be granted in all respects. I do not reach the other motion for summary judgment and decline to give an advisory opinion on that. . . .

. . . .

BLASCHKE-MANSFELDT *v.* VITEK, INC.

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-1534

Excerpts from
PLAINTIFF'S FIRST AMENDED COMPLAINT
Filed March 31, 1989

COMES NOW, PLAINTIFF Constance Blaschke-Mansfeldt, by and through her attorneys, Charles S. Zimmerman, Esq. and Ronald S. Goldser, Esq., of Zimmerman Reed, individually and representative of a class of individuals similarly situated, for her Complaint in Class Action states and alleges:

PARTIES

. . . .

2. Defendant E.I. du Pont de Nemours & Co. is a corporation organized and existing under the laws of the State of Delaware doing business throughout the United States including Minnesota.

. . . .

CLASS ACTION ALLEGATIONS

4. Plaintiff brings this action on behalf of herself and all other individuals similarly situated:

a) A Class Action is alleged pursuant to Minnesota Rules of Civil Procedure, Rule 23.

b) The Class consists of all persons who now are or have been recipients of surgical implants of Vitek's Proplast TMJ Interpositional Implants, and who have suffered damage as a result of the implantation of the device.

. . . .

(e) The entire class of individuals receiving the implant consists of many thousands of persons; the precise number of class members is not known to plaintiff and is within the exclusive knowledge of the Defendants.

. . . .

Date: 3/31/89

ZIMMERMAN REED

/s/
By: Charles S. Zimmerman 120054

/s/
By: Ronald S. Goldser 35932
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MONSAAS *v.* VITEK, INC.

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-7382

Excerpts from
COMPLAINT
Filed May 4, 1989

COMES NOW, PLAINTIFF Barbara Monsaas, by and through her attorneys, Charles S. Zimmerman, Esq. and Ronald S. Goldser, Esq., of Zimmerman Reed, individually and representative of a class of individuals similarly situated, for her Complaint in Class Action states and alleges:

PARTIES

. . . .

2. Defendant E.I. du Pont de Nemours & Co. is a corporation organized and existing under the laws of the State of Delaware doing business throughout the United States including Minnesota.

. . . .

CLASS ACTION ALLEGATIONS

4. Plaintiff brings this action on behalf of herself and all other individuals similarly situated:

a) A Class Action is alleged pursuant to Minnesota Rules of Civil Procedure, Rule 23.

b) The Class consists of all persons who now are or have been recipients of surgical implants of Vitek's Proplast TMJ Interpositional Implants, and who have suffered damage as a result of the implantation of the device.

. . . .

(e) The entire class of individuals receiving the implant consists of many thousands of persons; the precise number of class members is not known to plaintiff and is within the exclusive knowledge of the Defendants.

. . . .

ZIMMERMAN REED

/s/
By: Charles S. Zimmerman 120054

/s/
By: Ronald S. Goldser 35932
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MONSAAS *v.* VITEK, INC.

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-7382

NOTICE OF FILING
NOTICE OF REMOVAL

PLEASE TAKE NOTICE that on the 9th day of June, 1989, Defendant VITEK, INC., a Texas corporation, Defendant E.I. DU PONT DE NEMOURS & CO., a Delaware corporation, and Defendants CHARLES A. HOMSY and ANN HOMSY, husband and wife, residents of the State of Texas, filed a Notice of Removal in the above-entitled action to United States District Court for the District of Minnesota. A true and accurate copy of the Petition for Removal is attached hereto and is filed with this Court in accordance with 28 U.S.C. Sec. 1446(d).

Dated: June 9, 1989.

Respectfully submitted:
LOMMEN, NELSON, COLE &
STAGEBERG, PA.

/s/ Paul C. Peterson

Paul C. Peterson, I.D. No. 151543
Randall E. Bennett, I.D. No. 192119
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(612) 339-8131

Attorneys for Defendants Vitek, Inc. and Defendants Charles A. Homsy and Ann Homsy

BLASCHKA-MANSFELDT *v.* VITEK, INC.

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-1534

NOTICE OF MOTION AND MOTION

TO: Vitek, Inc. and Charles A. Homsy, Defendants above-named and their attorney Paul C. Peterson, 1100 TCF Tower, 121 South Eighth Street, Minneapolis, Minnesota 55402; and E.I Du Pont De Nemours & Co., Defendant above named and its attorney William Forsyth, 1200 Title Insurance Building, Minneapolis, Minnesota 55401.

PLEASE TAKE NOTICE that Plaintiff Constance Blaschka-Mansfeldt will bring to Motion below on for hearing before the Honorable Kevin Burke, Judge of the above named Court on Friday the 13th day of October, 1989 at 2:30 p.m. or as soon thereafter as counsel may be heard at the above mentioned courthouse.

Plaintiff Constance Blaschka-Mansfeldt respectfully moves the Court for an Order as follows:

1. Certifying this case as a class action pursuant to Rule 23 M.R.Civ.P.

2. Defining the class as those who received the Proplast/Teflon Interpositional Implant in Minnesota.

3. Defining the class issues as the liability of Defendants on negligence, warranty, strict liability, and misrepresentation

theories in the design, manufacture, and marketing of the Proplast/Teflon Interpositional Implant.

Dated: 9/29/89

ZIMMERMAN REED

By: /s/
Ronald S. Goldser - #35932
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580 Lumber Exchange Building
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DIETZ *v.* VITEK, INC.

United States District Court
District of Minnesota, Third Division
No. 3-89-711

NOTICE OF MOTION AND MOTION TO STAY VITEK'S MOTION TO DISMISS THE CLASS ALLEGATIONS OR IN THE ALTERNATIVE CERTIFY AS A CLASS ACTION

PLEASE TAKE NOTICE that on the 20th day of April, 1990, before the Honorable Paul A. Magnuson, at the United States District Courthouse for the District of Minnesota, 316 North Robert Street, St. Paul, Minnesota at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned will bring on for hearing, the following motion:

MOTION

1. Plaintiff Ann Dietz hereby moves the Court to stay the Motion of Defendant Vitek, Inc. to dismiss Plaintiff's class action allegations.

2. In the alternative Plaintiff Ann Dietz respectfully requests the Court to certify the instant case as a class action.

This Motion is based on the Memorandum of Law and other materials attached hereto.

Dated: 4/11/90

ZIMMERMAN REED

By: /s/
Ronald S. Goldser - #35932
Attorneys for Plaintiff
580 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 341-0400

DIETZ *v.* VITEK, INC.

United States District Court
District of Minnesota, Third Division
No. 3-89-711

MEMORANDUM OF LAW

Defendant Vitek, Inc. seeks to dismiss the class action allegations in this case and all other Vitek, Inc. cases now pending in this Court. A Motion to certify Vitek, Inc. litigation as a class action is pending before the Honorable Kevin Burke, Hennepin County District Court File No. 89-1534. This matter was argued on March 27, 1990 and is under advisement.

STAY OF PROCEEDINGS

Because of the pendency of this self-same Motion before State Court, Plaintiff Ann Dietz, and all other Plaintiffs in the Vitek, Inc. litigation in Federal Court, seek that the Motion to Dismiss the class allegations be stayed pending resolution of the matter before Judge Burke. Attached hereto and incorporated by reference are relevant portions of Moore's Federal Practice which describe the power of the Court to stay proceedings such as the Motion brought by Defendant Vitek, Inc. in this case.

CLASS ACTION CERTIFICATION

In the alternative, if the Court chooses to proceed with the class action question, the issue of certification should be squarely presented. By alternative responsive motion then, Plaintiff seeks to certify it as a class. The arguments made in favor of certification in this Court are exactly the same as the arguments made before Judge Burke. Accordingly the matter submitted before the State Court are submitted for purposes of decision here. They are attached to this memorandum and incorporated by reference. Because these motions are being made in a number of different court files, to save paper,

everything is being submitted under the *Dietz* caption; all matters set forth herein are relevant to all other pending Vitek, Inc. cases.

Dated: 4/11/90

ZIMMERMAN REED

By: /s/
Ronald S. Goldser - #35932
Attorneys for Plaintiff
580 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 341-0400

MONSAAS *v.* VITEK, INC.

United States District Court
District of Minnesota, Third Division
No. 3-89-385

NOTICE OF MOTION AND MOTION TO STAY VITEK'S MOTION TO DISMISS THE CLASS ALLEGATIONS OR IN THE ALTERNATIVE CERTIFY AS A CLASS ACTION

PLEASE TAKE NOTICE that on the 20th day of April, 1990, before the Honorable Paul A. Magnuson, at the United States District Courthouse for the District of Minnesota, 316 North Robert Street, St. Paul, Minnesota at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned will bring on for hearing, the following motion:

MOTION

1. Plaintiff Barbara Monsaas hereby moves the Court to stay the Motion of Defendant Vitek, Inc. to dismiss Plaintiff's class action allegations.

2. In the alternative Plaintiff Barbara Monsaas respectfully requests the Court to certify the instant case as a class action.

This Motion is based on all the files, records, and proceedings set forth in Ann Dietz vs. Vitek, Court File No. 3-89-711.

Dated: 4/11/90

ZIMMERMAN REED

By: /s/
Ronald S. Goldser - #35932
Attorneys for Plaintiff
580 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 341-0400

MONSAAS *v.* VITEK, INC.

United States District Court
District of Minnesota
Third Division
Civil No. 3-89-0385

ORDER

Charles S. Zimmerman, Esq., Ronald S. Goldser, Esq., Zimmerman Reed, Fifth Floor Atrium, 580 Lumber Exchange Building, Ten South Fifth Street, Minneapolis, MN 55402 for the plaintiff.

Paul C. Peterson, Esq., Randall E. Bennett, Esq., Lommen, Nelson, Cole & Stageberg, 1100 Twin City Federal Tower, 121 South Eighth Street, Minneapolis, MN 55402, William F. Forsyth, Esq., Roy S. Ginsburg, Esq., Henson & Efron, 1200 Title Insurance Building, Minneapolis, MN 55401, for the defendants.

This matter came before the court for hearing upon defendants' motion to dismiss plaintiff's class allegations and upon the motion of defendants Charles A. Homsy and Ann Homsy to dismiss for lack of personal jurisdiction. Plaintiff opposed the motion to dismiss class allegations and requested a stay of proceedings. In the alternative, plaintiff sought class certification. At the hearing the parties did not argue the personal jurisdiction motion because they are working on a stipulation to dispose of it. For the reasons set forth orally at the hearing, the court granted defendants' other motion.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to stay proceedings is DENIED.
2. Plaintiff's motion for class certification is DENIED.
3. Defendants' motion to dismiss class allegations is GRANTED.

4. The motion of defendants Charles A. Homsy and Ann Homsy to dismiss for lack of personal jurisdiction is DENIED as moot.

Dated: April 24, 1990.

/s/
Paul A. Magnuson
United States District Court Judge

BLASCHKA-MANSFELDT *v.* VITEK, INC.

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-1534

ORDER AND MEMORANDUM

The above-entitled matter came on for hearing on March 27, 1990, before the Honorable Kevin S. Burke pursuant to plaintiff's motion for class certification.

Ronald S. Goldser, Esq., appeared for and on behalf of plaintiff. Mark N. Stageberg, Esq., appeared for and on behalf of defendant Vitek, Inc. William F. Forsyth, Esq., and Ross F. Schmucki, Esq., appeared for and on behalf of defendant E.I. du Pont de Nemours and Company.

Based upon the files, records and proceedings held herein, the Court makes the following:

ORDER

1) That plaintiff's motion for class certification is DENIED.

2) That the attached memorandum be incorporated herein by reference.

BY THE COURT:

/s/
Kevin S. Burke
Judge of District Court

Dated: This 24th day of May 1990

Supreme Court, U.S.
FILED
AUG 18 1994
OFFICE OF THE CLERK

No. 94-134

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SARAH ASHBY SAWTELL,
Petitioner,

VS.

E. I. DU PONT DE NEMOURS AND COMPANY, INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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August 18, 1994

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Should this Court take jurisdiction of a case which recognized the validity of the class action tolling doctrine but held it inapplicable to Petitioner because of an interpretation of the pleadings in the class action?

(2) Should this Court take jurisdiction of a case that held the class action tolling doctrine inapplicable to an alleged class member who filed an independent lawsuit against one class action defendant while the class action was pending, but slept on her right to sue the other class action defendant until after the statute of limitations expired?

(3) Should this Court take jurisdiction of a case where the class action complaint failed to give the defendant adequate notice of the substantive claims now made against it?

(4) Should this Court take jurisdiction of a case in which the plaintiff has no viable cause of action even if the class action tolling doctrine is applied because, as numerous courts have held in the same fact pattern, the defendant owed no legal duty to plaintiff?

LIST OF PARTIES

Petitioner is Sarah Ashby Sawtell ("Sawtell"), and Respondent is E.I. du Pont de Nemours & Company, Inc., a Delaware corporation ("DuPont").

RULE 29.1 STATEMENT

There are presently two *publicly* held entities in which respondent DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: Du Pont Canada Inc. is a subsidiary company, and DNA Plant Technology Corporation is a company in which DuPont holds an indirect minority, noncontrolling interest.

The Seagram Company, Ltd., through its wholly owned subsidiary companies, owns approximately 24.2 percent of DuPont common stock.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. The Court of Appeals' Decision Does Not Conflict With The Class Action Tolling Doctrine 4

II. The Court of Appeals' Decision Is Supported On Other Narrow Grounds 6

III. Consideration Of The Questions Presented Would Be Futile, Because Petitioner's Action Is Meritless 7

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

Case ***Page***

American Pipe & Construction Co. v. Utah,
414 U.S. 538 (1974) 6, 7

Anguiano v. E.I. du Pont de Nemours & Co.,
808 F. Supp. 719 (D. Ariz. 1992) 8

Blaschka-Mansfeldt v. Vitek, Inc.,
No. 89-1534 (Minn. Dist. Ct., Jan. 5, 1994) 2, 8

Bond v. E.I. du Pont de Nemours & Co.,
868 P.2d 1114 (Colo. App. 1993) 8

Collins v. E.I. du Pont de Nemours & Co.,
____ P.2d _____, 2 CA-CV 92-0247 (Ariz. Ct. App.,
Oct. 26, 1993 — publication ordered Dec. 10, 1993) 8

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 4, 6, 7

Hegna v. E.I. du Pont de Nemours & Co.,
825 F. Supp. 880 (D. Minn. 1993),
aff'd per curiam order (8th Cir., June 22, 1994) 8

Kalinowski v. E.I. du Pont de Nemours & Co.,
851 F. Supp. 149 (E.D. Pa. 1994) 8

Case **Page**

Kealoha v. E.I. du Pont de Nemours & Co.,
844 F. Supp. 590 (D. Haw. 1994) 8

Klem v. E.I. du Pont de Nemours & Co.,
19 F.3d 997 (5th Cir. 1994) 8

LaMontagne v. E.I. du Pont de Nemours & Co.,
834 F. Supp. 576 (D. Conn. 1993) 8

Lego v. McNeilab, Inc.,
1986 W.L. 338 (E.D. Pa., April 11, 1986) 6

Longo v. E.I. du Pont de Nemours & Co.,
632 So. 2d 1193 (La. App. 1994) 8

Miller v. E.I. du Pont de Nemours & Co.,
811 F. Supp. 1286 (E.D. Tenn. 1992) 8

Nowak v. E.I. du Pont de Nemours & Co.,
827 F. Supp. 1334 (W.D. Mich. 1993) 8

Parker v. E.I. du Pont de Nemours & Co.,
No. CV-91-423 (N.M. Dist. Ct., Apr. 4, 1994) 8

Rynders v. E.I. du Pont de Nemours & Co.,
21 F.3d 835 (8th Cir. 1994) 8

Veil v. Vitek, Inc.,
803 F. Supp. 229 (D.N.D. 1992) 8

DuPont respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Sawtell.

COUNTERSTATEMENT OF THE CASE

In this diversity action, Sawtell, a resident of New Mexico, seeks damages from DuPont based on strict liability and negligence theories. Sawtell alleges that she was injured by two different temporomandibular joint ("TMJ") implants designed, manufactured, and sold by Vitek, Inc., a federally regulated medical device manufacturer. The implants in question were an interpositional implant and a total joint replacement which were implanted at different times. Both implants were made by Vitek from a Vitek-patented biomaterial called Proplast®. One of the raw materials used by Vitek in fabricating Proplast® was a plastic polymer, polytetrafluoroethylene ("PTFE"). PTFE is sold by numerous manufacturers, including DuPont under the trademark Teflon®.

Sawtell's statements at page 2 of her Petition regarding DuPont's supposed knowledge of the danger of the use of its raw materials in Vitek's products are misstatements, unsupported by the record, and irrelevant to the questions presented for review. In fact, DuPont's policy before selling any raw material (not just PTFE) to any medical device manufacturer, including Vitek, was to advise the purchaser that its materials were not made for medical use and that the purchaser would have to use its own scientific and medical judgment in deciding whether the raw material was appropriate. Consequently, Vitek evaluated the safety of its Proplast® implants, tested the components of the devices in animals and humans, and sold the implants to oral surgeons and other licensed physicians after being authorized to do so by the Food and Drug Administration.

Sawtell's interpositional implants were removed in December of 1984, only ten months after they had been implanted, and were replaced with total joint replacements. The total joint replacements were removed in September of 1987. The Court of Appeals found, and Sawtell no longer disputes, that she knew or should have known by September 1987 that her injuries were caused by a foreign body reaction to the "Proplast®/Teflon®" materials in the implants. Consequently, Sawtell's claims against DuPont were barred by New Mexico's three-year statute of limitations unless they were filed before September 1990.

On March 31, 1989, unbeknownst to Sawtell, a class action suit, *Blaschka-Mansfeldt v. Vitek, Inc.*, was filed in Minnesota state court against Vitek and DuPont on behalf of injured recipients of Vitek's interpositional implants. *See* Petition A13-14. Two other identical class actions were filed shortly thereafter, also in Minnesota state court: *Monsaas v. Vitek, Inc.* and *Dietz v. Vitek, Inc.*[1] *See id.* at A15-17, A20. The class actions did not involve persons who, like Sawtell, had received the total joint replacement implant. The class action complaints also specifically stated that the relevant implants were implanted "by a dental health care provider licensed in the State of Minnesota" (Respondent's App. at A-1 - A-2, A-4 - A-5). Motions to certify filed later in the class actions confirmed that the complaints were intended only to include only Minnesota plaintiffs. The Court of Appeals analyzed the pleadings and interpreted them as not making Sawtell a member of the putative class of Minnesota implant recipients.

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[1] *Monsaas* and *Dietz* subsequently were removed to federal district court in Minnesota on the basis of diversity.

Although DuPont was named in the class actions, it was lumped together with the other defendants. Contradictory allegations were made that the defendants "or some of them" had designed, manufactured and sold Proplast® TMJ Implants. No specific allegations were directed against DuPont in the complaints and no claim was made that DuPont was liable as a raw material supplier to Vitek, the basis of DuPont's alleged liability here. Sawtell makes no claim that she knew of or relied on the Minnesota class action complaints in deciding whether or when to sue DuPont herself.

On April 14, 1989, during the pendency of the class action litigation, Sawtell filed her own product liability suit against Vitek for her alleged injuries from the interpositional and total joint replacement implants ("the *Vitek* case"). Unlike the plaintiffs in the Minnesota class actions, Sawtell chose not to sue DuPont at that time. During the course of her litigation in the *Vitek* case, Sawtell's attorney took the deposition of Vitek's president on February 28, 1990, and obtained specific testimony concerning DuPont's sales of raw materials to Vitek. On June 8, 1990, Vitek filed a suggestion of bankruptcy in the *Vitek* case. Sawtell then delayed until September 20, 1990 before filing the present lawsuit against DuPont.

Despite the fact that during the pendency of the Minnesota class actions, Sawtell knowingly chose to sue only Vitek, she now seeks to take advantage of this Court's class action tolling doctrine to save her untimely individual action against DuPont. The Court of Appeals correctly held that the tolling doctrine should not apply given this factual scenario.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari never focuses on what the Court of Appeals actually decided — a question of pleading interpretation. The court read the Minnesota class action complaints as limited to Minnesota residents; hence, it concluded that Petitioner, a resident of New Mexico, would not have been a member of the proposed classes and could not claim tolling. This ruling was correct but, even more importantly, is a narrow determination that is extremely unlikely to have consequences beyond the immediate case.

The issues that Petitioner would prefer to argue are not presented by this case. The Court of Appeals did not reach the question whether the tolling doctrine applies in diversity cases. Petitioner's criticisms of other lower court decisions, or even of the district court's now-superseded ruling, are beside the point. Finally, review by this Court would be futile because, even if the tolling doctrine somehow salvaged Petitioner's complaint, courts reaching the merits of Proplast® TMJ implant claims against DuPont have consistently held that such claims are invalid as a matter of law.

I. The Court of Appeals' Decision Does Not Conflict With The Class Action Tolling Doctrine.

The Court of Appeals' decision did not limit the scope of the class action tolling doctrine in any way. Citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983), the Court of Appeals expressly noted that "[t]he filing of the class action suit tolls the statute of limitations for all asserted class members, and the statute of limitation remains tolled 'until the class certification is denied.'" Petition at A8-A9.

In fact, none of the broad issues identified by Sawtell were addressed by the Court of Appeals. The court did not reach the question of whether the class action tolling doctrine applies in diversity cases,[2] or whether the named plaintiff must have standing. *See* Petition at 13-14. Nor did the court address any other issue as to which reported case law reflects some supposed "confusion" or "hostility." *See id.* The Court of Appeals only interpreted the complaints and other documents filed in the Minnesota lawsuits that Sawtell claimed were relevant. As the record reflects:

- the class actions were initiated within the Minnesota state system pursuant to Minnesota's class action rule;

- the complaints said nothing about attempting to establish a nationwide class;

- the complaints expressly stated that the implants were implanted "by a dental health care provider licensed within the State of Minnesota"; and

- later motions to certify confirmed that the proposed class was limited to Minnesota residents.

Based on the relevant documents, the Court of Appeals rightly held that Sawtell was not one of the "asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Petition at A10, *citing*

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[2] As Sawtell acknowledges, any conflict as to whether the class action tolling doctrine applies in diversity cases is only a conflict in *dicta*. *See* Petition at 13-14.

Crown, 462 U.S. at 353-54, and *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Nothing broader was decided. There is no conflict or question of general public importance involved in this case.

II. The Court of Appeals' Decision Is Supported On Other Narrow Grounds.

The Court of Appeals' decision was proper on two other narrow grounds that do not involve any conflict or question of general public importance.

First, tolling has never been applied where, notwithstanding the existence of the class action suit, the plaintiff filed an independent action against one of the class defendants. Tolling has been applied only where the putative class member postponed filing any lawsuit under the legal fiction that he or she was relying on the class action to protect his or her rights. *Crown*, 462 U.S. at 352 ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights . . . ."); *American Pipe*, 414 U.S. at 541. *See also Lego v. McNeilab, Inc.*, 1986 W.L. 338 (E.D. Pa., April 11, 1986) (tolling doctrine inapplicable where plaintiff filed action while class suit was pending).

Second, the allegations in the Minnesota complaints did not give DuPont the required notice of the substantive claims being brought against it nor the number and identities of the potential plaintiffs.[3] *Crown*, 462 U.S. at 354 (Powell, J., concurring);

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[3] Contrary to Sawtell's statements at page 11 of her Petition, there was sufficient evidence on this issue: the complaints themselves.

American Pipe, 414 U.S. at 554-555; the class action complaints in Minnesota were brought on behalf of "recipients of surgical implants of Vitek's Proplast® TMJ *Interpositional* Implants." Petition at A15 (emphasis added). The only implant that is subject to any real dispute in this case is the total joint replacement that Sawtell received in September 1987.[4] The Minnesota plaintiffs' "shotgun" approach to pleading also did not give DuPont notice of claims like those asserted by Sawtell. The substantive allegations in the Minnesota complaints were directed only against Vitek and its founder, Dr. Charles Homsy, and make no reference whatsoever to DuPont's raw materials. Under the circumstances, Sawtell's claims are "[c]laims as to which [DuPont] was not fairly placed on notice by the class suit [and] are not protected under *American Pipe* and are barred by the statute of limitations." *Crown*, 462 U.S. at 355 (Powell, J., concurring).

III. Consideration Of The Questions Presented Would Be Futile, Because Petitioner's Action Is Meritless.

Even if tolling applied, Sawtell would have no cause of action, because DuPont had no state-law legal duty to her. In the district court, DuPont moved for summary judgment on both the statute of limitations and the absence of any legal duty. The district court declined to address the duty issue, which had been fully briefed, in light of its ruling on the statute of limitations. Numerous other courts, however, have held that DuPont, as a bulk raw material supplier, owed no duty to the users of a fin-

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[4] Sawtell received interpositional implants too, but they were removed in December 1984, and the three-year statute of limitations for filing any claims relating to them expired long before the Minnesota actions were initiated.

ished medical device that was designed, manufactured, and sold by another company. Thirty-four consecutive trial court rulings and all seven appellate decisions to date have held that DuPont is entitled to judgment as a matter of law.[5]

In light of the numerous decisions on the issue of duty, it would be a waste of time for this Court to decide whether the statute of limitations for Sawtell's cause of action was tolled by the filing of the Minnesota class actions. Certiorari should not be granted to issue what in effect would be an advisory opinion.

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[5] The following decisions have been designated for publication: *Klem v. E.I. du Pont de Nemours & Co.*, 19 F.3d 997 (5th Cir. 1994); *Rynders v. E.I. du Pont de Nemours & Co.*, 21 F.3d 835 (8th Cir. 1994); *Kealoha v. E.I. du Pont de Nemours & Co.*, 844 F. Supp. 590 (D. Haw. 1994); *Kalinowski v. E.I. du Pont de Nemours & Co.*, 851 F. Supp. 149 (E.D. Pa. 1994); *LaMontagne v. E.I. du Pont de Nemours & Co.*, 834 F. Supp. 576 (D. Conn. 1993); *Hegna v. E.I. du Pont de Nemours & Co.*, 825 F. Supp. 880 (D. Minn. 1993) (affirmed by Eighth Circuit, Nos. 93-3162/93-3173, in unpublished *per curiam* order on June 22, 1994); *Nowak v. E.I. du Pont de Nemours & Co.*, 827 F. Supp. 1334 (W.D. Mich. 1993); *Anguiano v. E.I. du Pont de Nemours & Co.*, 808 F. Supp. 719 (D. Ariz. 1992); *Miller v. E.I. du Pont de Nemours & Co.*, 811 F. Supp. 1286 (E.D. Tenn. 1992); *Veil v. Vitek, Inc.*, 803 F. Supp. 229 (D.N.D. 1992); *Collins v. E.I. du Pont de Nemours & Co.*, __ P.2d ___, 2 CA-CV 92-0247 (Ariz. Ct. App., Oct. 26, 1993 — publication ordered Dec. 10, 1993); *Bond v. E.I. du Pont de Nemours & Co.*, 868 P.2d 1114 (Colo. App. 1993); *Longo v. E.I. du Pont de Nemours & Co.*, 632 So. 2d 1193 (La. App. 1994). After denying class certification, the Minnesota trial court granted summary judgment to DuPont on the issue of duty in *Blaschka-Mansfeldt v. Vitek, Inc.*, No. 89-1534 (Minn. Dist. Ct., Jan. 5, 1994). A New Mexico trial court also granted summary judgment to DuPont on the issue of duty in *Parker v. E.I. du Pont de Nemours & Co.*, No. CV-91-423 (N.M. Dist. Ct., Apr. 4, 1994).

CONCLUSION

For all of the above reasons, DuPont respectfully requests that this Court deny the Petition for Certiorari.

RESPECTFULLY SUBMITTED.

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August 18, 1994

APPENDIX

BLASCHKE-MANSFELDT v. VITEK, INC., E.I. DU PONT DE NEMOURS & CO., a Delaware corporation, and CHARLES A. HOMSY and ANN HOMSY

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-1534

Excerpts from
PLAINTIFF'S FIRST AMENDED COMPLAINT
Filed March 31, 1989

COMES NOW, PLAINTIFF Constance Blaschke-Mansfeldt, by and through her attorneys, Charles S. Zimmerman, Esq. and Ronald S. Goldser, Esq., of Zimmerman Reed, individually and representative of a class of individuals similarly situated, for her Complaint in Class Action states and alleges:

. . .

COUNT I
NEGLIGENCE

5. That Defendants, all of them or some of them and each of them, negligently designed, manufactured, processed, placed in the marketplace, obtained FDA approval, promoted, advertised, supplied, distributed, sold, and/or failed to warn about a temporal mandipular joint prosthesis known as "Proplast."

6. That on or about December 26, 1984 Proplast was implanted in the body of the Plaintiff by a dental health care

provider licensed in the State of Minnesota. That as a direct result of the conduct of the Defendants and each of them as stated in paragraph 5, Plaintiff has sustained serious, painful and permanent injuries together with emotional pain and discomfort, . . .

COUNT II
STRICT LIABILITY

7. Plaintiff re-alleges paragraphs 1 through 6 above.

8. The product Proplast was defective and unreasonably dangerous; the Defendants, and each of them, knew or should have known that Proplast was defective and unreasonably dangerous but nonetheless placed Proplast into the stream of commerce and/or failed to warn of the defectiveness and unreasonable danger; the defects and dangers of Proplast were beyond the contemplation of the reasonable consumer and Plaintiff; the Proplast was implanted in Plaintiff and used by Plaintiff in a reasonably foreseeable manner.

9. The product Proplast caused harm to Plaintiff and Defendants, because of their superior knowledge and position, owed a strict duty to Plaintiff not to harm her through the use of their product.

10. That as a direct result of Defendants activities in designing, manufacturing, processing, placing in the market place, obtaining FDA approval, promoting, advertising, supplying, distributing and/or selling the product Proplast, Plaintiff has suffered the damages as more fully set forth in paragraph 6 above for which the Defendants are strictly liable.

COUNT III
WARRANTY AND MISREPRESENTATION

11. Defendants, and each of them, warrant and represented to Plaintiff, by and through the use of materials accompanying the distribution of the product Proplast that the product was safe for use in the manner in which it was used in Plaintiff.

12. At the time of marketing Defendants and each of them, knew or should have known that their representations and warranties were false, and that the product Proplast was not fit for the particular purpose to which it was to be put.

13. As an approximate result of the breach of warranty and misrepresentation by Defendants, Plaintiff has suffered the damages more fully set forth in paragraph 6 for which the Defendants are strictly liable.

. . .

MONSAAS v. VITEK, INC., E.I. DU PONT DE NEMOURS & CO., and CHARLES A. HOMSY and ANN HOMSY

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-7382

Excerpts from
COMPLAINT
Filed May 4, 1989

COMES NOW, PLAINTIFF Barbara Monsaas, by and through her attorneys, Charles S. Zimmerman, Esq. and Ronald S. Goldser, Esq., of Zimmerman Reed, individually and representative of a class of individuals similarly situated, for her Complaint in Class Action states and alleges:

. . .

COUNT I
NEGLIGENCE

5. That Defendants, all of them or some of them and each of them, negligently designed, manufactured, processed, placed in the marketplace, obtained FDA approval, promoted, advertised, supplied, distributed, sold, and/or failed to warn about a temporal mandipular joint prosthesis known as "Proplast."

6. That on or about May, 1985, Proplast was implanted in the body of the Plaintiff by a dental health care provider

licensed in the State of Minnesota. That as a direct result of the conduct of the Defendants and each of them as stated in paragraph 5, Plaintiff has sustained serious, painful and permanent injuries together with emotional pain and discomfort, has been required to expend substantial sums of money for her own continued care and treatment, . . .

COUNT II
STRICT LIABILITY

7. Plaintiff re-alleges paragraphs 1 through 6 above.

8. The product Proplast was defective and unreasonably dangerous; the Defendants, and each of them, knew or should have known that Proplast was defective and unreasonably dangerous but nonetheless placed Proplast into the stream of commerce and/or failed to warn of the defectiveness and unreasonable danger; the defects and dangers of Proplast were beyond the contemplation of the reasonable consumer and Plaintiff; the Proplast was implanted in Plaintiff and used by Plaintiff in a reasonably foreseeable manner.

9. The product Proplast caused harm to Plaintiff and Defendants, because of their superior knowledge and position, owed a strict duty to Plaintiff not to harm her through the use of their product.

10. That as a direct result of Defendants activities in designing, manufacturing, processing, placing in the market place, obtaining FDA approval, promoting, advertising, supplying, distributing and/or selling the product Proplast,

Plaintiff has suffered the damages as more fully set forth in paragraph 6 above for which the Defendants are strictly liable.

COUNT III
WARRANTY AND MISREPRESENTATION

11. Defendants, and each of them, warranted and represented to Plaintiff, by and through the use of materials accompanying the distribtion of the product Proplast that the product was safe for use in the manner in which it was used in Plaintiff.

12. Specifically, Defendant Vitek warranted and represented as follows:

. . .

13. The foregoing warranties and representations were made by Defendant Vitek in their brochures accompanying the products sent to doctors. The warranties and representations were used by the Plaintiff's physicians as the basis for their recommendations for medical treatment for Plaintiff. Plaintiff relied on these warranties and representations.

14. The warranties breached are expressed (336.2-313); implied warranty of merchantability (336.2-314); and fitness for particular purpose (336.2-315).

15. At the time of marketing, Defendants and each of them, knew or should have known that their representations and warranties were false, and that the product Proplast was not fit for the particular purpose to which it was to be put.

16. As a proximate result of the breach of warranty and misrepresentation by Defendants, Plaintiff has suffered the damages more fully set forth in paragraph 6 for which the Defendants are strictly liable.

. . .